

IN THE MATTER OF ARBITRATION BETWEEN

SEIU LOCAL 113)	OPINION AND AWARD
)	
AND)	FMCS CASE # 05-57064-7
)	
ST. PAUL'S CHURCH HOME)	Grievance re: Discharge

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ARBITRATOR: Charlotte Neigh

HEARING: December 7, 2005

POSTHEARING BRIEFS RECEIVED: December 21, 2005

AWARD: December 28, 2005

REPRESENTATIVES

For the Union:

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JURISDICTION AND PROCEDURE

Pursuant to the parties' Collective Bargaining Agreement and the procedures of the Federal Mediation and Conciliation Service, Charlotte Neigh was appointed to arbitrate this matter. A hearing was held in St. Paul, Minnesota at which time both parties had a full opportunity to offer evidence. By agreement of the parties, posthearing briefs were postmarked by December 19, 2005, and the record was closed upon their receipt.

ISSUE

Whether there was just cause for the Grievant's termination, and if not, what is the remedy?

PERTINENT AUTHORITY

COLLECTIVE BARGAINING AGREEMENT

"ARTICLE X - DISCHARGE-QUITS-DISCIPLINE

A. NO DISCHARGE OR DISCIPLINE WITHOUT JUST CAUSE

The Employer shall not discharge, suspend or discipline a non-proationary employee without just cause. Grounds for immediate discharge without prior warning shall include but not be limited to drunkenness on the job, possession of intoxicating liquor on the premises, possession or use of drugs on the premises, theft on the premises, dishonesty or infraction of reasonable rules directly affecting patient abuse, comfort or safety, physical violence and/or having weapons such as guns or switchblades on the premises."

BACKGROUND AND UNDISPUTED FACTS

The Grievant had been employed as a Nursing Assistant (NA) for less than two years. On 5/28/05 she and two other NAs were providing lunch to approximately 12 residents in the unit's dining room; routinely the lunch is supervised either by the LPN who is on duty as the Charge Nurse for the unit, or by the Trained Medication Aide (TMA) who assists the Charge Nurse in addition to delivering medications to the residents.

One of the residents assigned to the Grievant (hereafter referred to as L) was known to tend to eat his food too rapidly, which sometimes caused him to vomit up his food; this was of special concern because L was diabetic and it was important for him to retain his food due to the insulin he was given. The usual procedure to prevent L from gorging his food was to set his tray where he could not reach it and to serve him only one item/dish at a time. Events surrounding the feeding of L at lunchtime on 5/28/05, the precise nature of which is disputed, led to the Grievant's discharge.

The termination memorandum is dated 5/31/05 and signed by the Human Resources Director and the Staff Development Coordinator. Although this memorandum based the termination on two separate incidents, at the arbitration hearing the Employer withdrew the allegations regarding an earlier incident, which will not be addressed further in this decision. In relevant parts the 5/31/05 memorandum states:

"On May 28 you refused to give a resident with a swallowing/reflux condition food items or fluids from his tray because you thought he would vomit and you didn't want to have to clean him up. You first removed the tray from his area, then had it removed from the floor. This is an especially vulnerable resident, as he is unable to correctly feed himself. He must rely on staff. Staff instructions relating to this resident are that he should be fed slowly so as not to exacerbate his digestive problems, but in no case may staff willfully or intentionally deny food or fluid. Removing his tray and withholding food and fluids led directly to the resident becoming weak and disoriented for the remainder of the day. Under mandatory self-reporting requirements Social Services will be required to inform DHS and the Health Department of this incident.

Further, several co-workers who challenged your actions reported that you threatened then (sic) by saying "I'm going to get you if he throws up". They reported that (sic) were intimidated by both your statement and your manner. Causing a hostile work environment is not ever acceptable.

The primary responsibility of the Home is to protect and care for our vulnerable residents. You have failed to carry out this responsibility while at the same time intimidating your co-workers. We find we have no choice but to terminate your employment with St. Paul's Church Home."

A grievance dated 6/1/05 claimed discharge without just cause. The parties were unable to resolve this dispute and it proceeded to arbitration.

SUMMARY OF THE PARTIES' ARGUMENTS

THE EMPLOYER ARGUES THAT:

- The Grievant's refusal to give L food or fluids affected his comfort and safety, in violation of the CBA and the Minnesota Vulnerable Adults Act.
- The two witnesses to the Grievant's conduct who testified at the arbitration hearing are fellow bargaining unit employees and no evidence was presented to show any negative motivations.
- The Grievant removed L's tray and placed it back on the food cart after he had eaten only about one half of his lunch. This was the observation of one of the coworkers, MA, whose responsibility it was to record the amount of food and fluid intake of each resident.
- The LPN/Charge Nurse who testified on behalf of the Grievant was not present throughout the entire meal, and was not observing L in particular but all of the residents generally. She is not a credible witness because she testified that she monitored L's blood glucose at 11:00 a.m. but no such monitoring was charted. Her testimony that L did not become weak and disoriented for the rest of the day was based on little opportunity to observe him between the end of the midday meal and the end of her shift; she admitted that L was not well the following morning. This could have been a direct result of not getting his proper foods and fluids at noon on the day before.
- The Grievant's testimony is unreliable because she is trying to regain her job; the witnesses against her have no reason to be untruthful. The Grievant's implication that the TMA made allegations against her in retaliation for a verbal exchange between them earlier in the day was belied by the evidence that the exchange actually happened on the following day.
- The testimony taken as a whole supports the Employer's termination of the Grievant. She should not be reinstated and no back pay should be awarded.

THE UNION ARGUES THAT:

- The Grievant was denied due process because the Employer failed to conduct an adequate investigation, which is essential for determining just cause. The Employer failed to interview the Grievant to ascertain her version of what occurred before terminating her. The Employer failed to interview the LPN who was supervising the lunchroom, even though the LPN was identified in a report written by the RN as the one who had received notice of L's weak condition. The Employer's main witness, who was involved in the decision to discharge the Grievant, admitted on cross-examination that she has since learned that higher standards should have been applied to the investigation. The inadequate investigation alone is enough to sustain the grievance.
- The termination was premised upon allegations of two separate events but one of these was withdrawn by the Employer at the hearing; therefore the termination should not stand. Without the withdrawn allegation, the 5/28/05 allegations become an isolated incident rather than a pattern of improper behavior that would justify termination. Even if the 5/28/05 allegations were proven, one isolated incident of failing to complete feeding of a resident is not grounds for termination.

Union Arguments (continued)

- The Grievant's supervisor, an unbiased and experienced LPN who was the unit Charge Nurse that day, presented the strongest evidence of what happened in the lunchroom. She testified that she observed the Grievant to feed L in the proper manner, feeding him one item at a time while keeping the tray away from him.
- The Charge Nurse also refuted the claim of the TMA that she had reported to the Charge Nurse that the Grievant was not feeding L. She explained that she followed their normal practice when she went to supervise the lunchroom because the TMA was leaving to deliver medications.
- The other coworker who made allegations about the Grievant's conduct admitted that her back was to the Grievant and so she was not in a position to observe how L was being fed. In addition, her testimony was confused between the breakfast meal and the lunch meal. Her only basis for her opinion that L had not been properly fed was that she saw a tray containing unconsumed food on the foodcart at the end of the meal and that she believed this to be L's tray. Finally, she did not report the failure to feed L to the Charge Nurse. Her testimony, even if in good faith, is not sufficient to overcome the testimony of the Grievant and the Charge Nurse. The Employer's failure to meet its burden of proof in this case is sufficient to sustain the Grievant and reinstate her with with a full, make-whole remedy.
- There is no evidence that L became weak and disoriented on 5/28/05, as asserted in the termination memorandum as a result of the Grievant's denying him food at lunch. Both of the accusing coworkers testified that they did not observe L to be weak and disoriented after lunch. The Charge Nurse observed him during his usual 30-45 minutes of sitting by the nursing station after lunch and saw nothing unusual. The Grievant testified that he was normal for the rest of her shift. Although L did have some problems in getting up on the following morning, there was no evidence of any connection to his feeding on the previous day, and it was consistent with his history for him to sometimes have bad days. The failure to establish this essential element of the grounds for termination is a basis for sustaining the grievance.
- There is no evidence that the Employer ever reported this alleged abuse to DHS or the Health Department. The Grievant has never been contacted about this and continues to hold her license. The Employer's main witness, the Director of Nursing, testified that she could find no evidence that such a report was made. Including such language in the termination letter tends to embellish the seriousness of the allegation; since no such report was made, the opposite inference should be made - that this was not serious enough to generate a report to the state under the mandatory reporting requirement.
- The Employer made no attempt to produce as witnesses persons who would have had knowledge regarding the 5/28/05 incident: the Human Resource Director who signed the termination letter; the person who was Acting Director of Nursing at the time; and the Building Charge Nurse on 5/28/05 who conducted what little investigation was done. The failure to call these witnesses should lead to the conclusion that their testimony would have supported the Grievant's case.

Union Arguments (continued)

- The Grievant had a clean record with the Employer, with no disciplinary actions against her. It is only logical that if she was abusive to residents she would have a history of such abuse and the lack of any such history supports the contention that she did not mistreat L on 5/28/05.
- This is one of the weakest cases regarding serious allegations of patient abuse that the Union has ever seen: the Employer withdrew allegations of serious neglect on an earlier occasion; the Employer did not prove the misfeeding allegations; and there was no evidence regarding the alleged resulting illness of the resident. The Union's evidence shows that the Grievant properly fed the resident and that he was normal for the remainder of that day. The Grievant should be reinstated with full back pay, benefits and seniority, less interim earnings.

ANALYSIS AND DISCUSSION

When the Employer decided to terminate the Grievant's employment it admittedly relied on only the two statements written by the RN that purported to reflect the observations of the Trained Medication Aide (hereafter the TMA) and of Nursing Assistant MA (hereafter MA). The failure to investigate further, by questioning the TMA, MA, the RN who wrote their statements, the Grievant, the other NA who was present, the Charge Nurse and any other person with related knowledge, left the Employer without relevant information necessary to making a sound decision, and deprived the Grievant of the due process that is essential to a fair determination of just cause. This conclusion alone could be sufficient to sustain the grievance but the facts of the occurrence will also be analyzed in the interest of clearing the Grievant's record and restoring her reputation.

RE: TESTIMONY OF EMPLOYER'S WITNESSES TO EVENT

The two statements written by the RN were received into evidence over the Union's objection. These statements are not dated but the TMA testified that they were done the following Monday, two days after the Saturday in question, when the RN initiated a conversation regarding whether Saturday had been a rough day and questioned whether the Grievant had been "talking bad". The RN who wrote these statements and brought the situation to the attention of upper management was subsequently discharged by the Employer and was not subpoenaed to testify. Any reason she might have had for questioning the TMA and MA remains unknown.

The Union's objection to the hearsay nature of these statements was sustained and they were received only for the purpose of demonstrating the basis on which management decided to terminate the Grievant's employment, and not for the truth of the matters asserted therein. The two witnesses were required to testify from their respective recollections without referring to the written statements. It is noted that there are some significant differences between the testimony of the two witnesses and the written statements regarding the particulars of what transpired. The findings in this matter will rely on their testimony rather than the written statements.

Analysis and Discussion - Employer's Witnesses (continued)

These two witnesses are both from Ethiopia; one explained that the statements were written by the RN because English is not their first language. Although they asserted that they had read and agreed with the statements, their ability to understand written English was not established, and they both demonstrated some difficulty in speaking and comprehending spoken English at the hearing. Their confused and self-contradictory testimony might be attributable to difficulty with English and/or to faulty recollections regarding what happened. These two witnesses and the Grievant denied any animosity between them and the Grievant; the Union did not accuse either witness of deliberately telling falsehoods.

MA testified variably that:

- L was drinking water and coughing. She asked the Grievant to give L his tray, which was on a different table; the TMA told the Grievant to give L his tray; the usual procedure for feeding L is to give him one item at a time and to set his tray where he can't reach it; it is not unusual for his tray to be on a separate table; the Grievant was nearby feeding another resident and was giving L one item at a time.
- The Grievant's responses were that: she was not going to feed him because he would vomit; they should wait before giving him food so that he wouldn't vomit.
- The TMA gave L his tray while the Grievant was out of the room; the TMA gave L one item while the Grievant was out of the room.
- The Grievant came back in and asked who gave L his tray; the Grievant was "yelling" at the TMA; the Grievant said "He will vomit and if he does I'm going to get you."; (MA's demonstration of the loudness of the Grievant's voice was only slightly louder than MA's volume level during her testimony).
- She saw L eat half of his food and didn't know whether he finished; L's tray was removed with half of the food still on it; she couldn't remember who removed L's tray.
- The TMA said nothing to the Grievant; they were arguing in the hallway and MA didn't know what they said.
- She did not tell the Charge Nurse what happened; before the Grievant and the TMA argued, MA told the Charge Nurse that L didn't eat; the TMA provided the Charge Nurse with more information.

Analysis and Discussion - Employer's Witnesses (continued)

The TMA testified, with some self-contradiction, that:

- It is her job to pass out medications and not to feed residents; she saw L sitting with his head on his arm; he had no food or water and his tray was on another table with everything still on it; the Grievant was not in the room; "I grabbed the food and he started eating"; she gave L one item; she gave L his whole tray; she didn't know whether he finished his lunch or how much he ate that day.
- The Grievant reentered the room and questioned who had given the tray to L; MA replied that the TMA had done it; the Grievant asked the TMA why; the TMA replied that L is diabetic and needs to eat; the Grievant said "If he vomits I'm going to get you"; the Grievant's voice was "just a little louder than normal"; (this witness first said that the Grievant said "I'm going to beat you up" but then corrected herself).
- When she left the room she told the Charge Nurse to go to the dining room and that the Grievant was yelling at her about giving food to L.

TESTIMONY OF UNION WITNESSES

The Charge Nurse very credibly testified that:

- On 5/28/05 during the dayshift she was in charge of the third floor unit, including the Grievant and L; it is required that either she or the TMA supervise meals in the dining room.
- During breakfast time MA told her that she didn't believe that the Grievant was going to feed L; the Charge Nurse went into the dining room and the Grievant reported to her that L had vomited some clear liquid, probably water used to wash down his morning medications; she explained to the Grievant that it was important for L to eat because he had been injected with insulin; they discussed this while L was eating his food, one item at a time because of his propensity to gorge himself and then vomit; she observed that L ate his entire breakfast.
- At lunchtime she was busy with other duties until the TMA came to her at the nursing station and said that she was leaving the dining room, so the Charge Nurse needed to go in there; she took this as routine practice and not related to any problem; she observed the three NAs, including the Grievant; she saw L at his usual spot, eating and with some empty dishes in front of him; the Grievant was nearby, assisting another resident with eating; she did not recall where L's tray was and did not look at it to see whether it was empty.
- After lunch L was routinely placed on a bench near the nursing station for 30 minutes before he was taken to his room for a nap; he was not weak or disoriented and she never received any report that day that he was; it is normal for L to rest his head on the table or on his walker.

Analysis and Discussion - Union's Witnesses - Charge Nurse (continued)

- She was never questioned by anyone in management regarding the events of that day before the Grievant was discharged on 5/31/05. She learned on Tuesday, 5/31/05, that the Grievant's employment had been terminated. She first learned of the allegations regarding the Grievant at lunchtime on 5/28/05 on the date of the arbitration hearing.

The Grievant credibly testified that:

- The dining room has three tables - one for residents who feed themselves, and two for residents who need assistance; L is assigned to her group and to table #1 where he sits with three other residents; L puts his head down, sometimes even in his food.
- She puts L's tray at a distance where he can't reach it or else he eats too fast and vomits; she lets him sit a while between items while she is feeding the others; at lunchtime on 5/28/05 she gave him some food and left the room to get something from the cart in the hallway; she returned and found that the TMA had given him his whole tray; she asked why and explained that he was to have a little at a time so that he wouldn't vomit; she made no threat and did not say that she would "get" the TMA; L finished his food at lunchtime and his empty tray was placed into the cart; trays containing food are not placed back in the cart because that has to be recorded; she does not recall which NA did the recording on that day.
- After lunch L spent his usual 30 minutes near the nursing station and then she took him to his room, changed him, and let him lie down; he was not weak or disoriented; he was normal for the rest of her shift.
- On Sunday morning, 5/29/05, L said he was ill and tired and he was a little weak; she had the Charge Nurse check his vital signs.
- On Tuesday, 5/31/05, she telephoned the Human Resources Director with questions about her hours and her vacation; the HR Director said that the Grievant should come in because they needed to talk; when she arrived, the HR Director tossed the termination memo at her and said she was terminated; she had not previously been questioned about feeding L; she was never contacted by the state regarding any report of abuse; she tried to find other employment but was not hired when she truthfully answered questions about her previous employment; she wants to return to her job and can be a good employee and not hold any grudges against the coworkers who accused her.

CONCLUSIONS

Regarding what actually happened at lunchtime on 5/28/05, given the inconsistent and self-contradictory testimony of the TMA and MA, as contrasted with the coherent and credible testimony of the Charge Nurse and the Grievant, it is concluded that the Grievant did not:

- Refuse to give L food items or fluids from his tray;
- Remove his tray with food remaining on it; or
- Cause L to become weak and disoriented for the remainder of the day (moreover, there is no evidence that he did become weak and disoriented that day or that his condition on the following day was related to his midday meal the previous day).

The evidence does not support that the Grievant was unacceptably loud when she objected to the TMA's giving L his entire tray of food; exactly what words she used cannot be ascertained with any certainty. It is possible that the TMA and MA, perhaps because of cultural differences, sincerely took offense at the Grievant's language or tone. However, if they had truly believed that the Grievant was threatening the TMA, they should have immediately reported this to the Charge Nurse, rather than waiting until questioned by the RN two days later. Given the Charge Nurse's credible testimony that she never heard about it, it is concluded that the Grievant's tone, words and volume were not such as to reasonably cause intimidation or a "hostile work environment".

Finally, it is concluded that the Employer did not have just cause to terminate the Grievant's employment.

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AWARD

1. The grievance is sustained.
2. The Grievant shall be reinstated with full back pay, benefits and seniority, less interim earnings.

December 28, 2005_____

Charlotte Neigh, Arbitrator